

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CYDNE M. WHITE)	
Claimant)	
)	
VS.)	
)	
CONTEMPORARY COMMUNICATIONS,)	
INC.)	
Respondent)	Docket No. 1,046,227
)	
AND)	
)	
MIDWEST INSURANCE COMPANY)	
Insurance Carrier)	
)	
AND)	
)	
KS. WORKERS COMPENSATION FUND)	

ORDER

This is a dispute between respondent and it's insurance carrier. Midwest Insurance Company (Midwest) requests review of the October 22, 2009 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

Claimant alleged she suffered a series of repetitive injuries each and every working day until her last day worked on June 8, 2009. At the preliminary hearing, claimant and respondent stipulated claimant suffered accidental injury on May 20, 2009. Midwest contends the accident occurred on June 8, 2009, after their insurance coverage ended on June 5, 2009.

The Administrative Law Judge (ALJ) determined the accident date was May 20, 2009, and found Midwest liable for claimant's medical treatment and temporary total disability compensation.

Midwest contends Judge Barnes erred. Midwest contends claimant's accident occurred on June 8, 2009, after their insurance coverage ended on June 5, 2009.¹ Therefore, Midwest argues the Order should be reversed.

Respondent argues the ALJ's Order should be affirmed.

It is clear from the evidentiary record and briefs that the issue on appeal is the date of accident for the sole purpose of determining whether respondent or its insurance carrier should pay for the preliminary hearing benefits ordered. Both of the alleged dates of accident occurred while claimant was working for respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

This appeal should be dismissed as the Board does not have jurisdiction to review the issue now presented by Midwest in an appeal from a preliminary hearing order.

Midwest has raised the question whether claimant's injury occurred during the period that Midwest provided respondent with workers compensation insurance coverage or after the period that Midwest provided that insurance coverage. Accordingly, the issue now presented to the Board is what is claimant's date of accident for purposes of determining liability between respondent and its insurance carrier, an issue which the Board does not have jurisdiction to review from a preliminary hearing order.

In appeals from preliminary hearing orders, the Board does not have jurisdiction to review every alleged error in fact or in law. In preliminary hearing matters, the Board's jurisdiction is specifically limited by K.S.A. 44-534a to the following issues, which are deemed jurisdictional:

- (1) Did the worker sustain an accidental injury?
- (2) Did the worker's accidental injury arise out of and in the course of employment?
- (3) Did the worker provide the employer with both timely notice of the accidental injury and timely written claim?

¹ Midwest's brief raises timely notice for the May 20, 2009 date of accident but that issue was neither raised nor argued before the ALJ at the preliminary hearing and will not be considered for the first time on this appeal.

(4) Are there any defenses that will defeat the compensability of the claim?

K.S.A. 44-534a(a)(2) provides, in part:

. . . A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

Additionally, the Board may review other preliminary hearing awards when a judge exceeds his or her jurisdiction. That authority is provided in K.S.A. 2008 Supp. 44-551(i)(2)(A), which provides, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. . . .²

But the administrative law judges have the jurisdiction at the preliminary hearing stage to decide medical compensation questions.³ And the judge has the jurisdiction to decide those questions rightly or wrongly.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁴

The Board was presented with a similar issue in the case of *Ireland*,⁵ where, in holding that the Board was without jurisdiction to consider the issue of which insurance carrier should pay for the preliminary hearing benefits, we said:

² K.S.A. 2008 Supp. 44-551.

³ K.S.A. 44-534a(a)(2).

⁴ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁵ *Ireland v. Ireland Court Reporting*, Nos. 176,441 & 234,974 1999 WL 123220 (Kan. WCAB Feb. 22, 1999).

Furthermore, it is inconsistent with the intent of the Workers Compensation Act for a respondent to delay preliminary hearing benefits to an injured employee while its insurance carriers litigate their respective liability. The employee is not concerned with questions concerning this responsibility for payment once the respondent's general liability under the Act has been acknowledged or established. *Kuhn v. Grant County*, 201 Kan. 163, 439 P.2d 155 (1968); *Hobelman v. Krebs Construction Co.*, 188 Kan. 825, 366 P.2d 270 (1961).

As the date of accident for purposes of determining liability between respondent or its insurance carrier is not an issue that the Board has the authority to review from a preliminary hearing order, Midwest's appeal should be dismissed. This Board Member finds that this matter should be dismissed and the Order of the ALJ remains in full force and effect.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated October 22, 2009, remains in full force and effect and the appeal of Midwest Insurance Company, in the above matter should be, and is hereby, dismissed.

IT IS SO ORDERED.

Dated this ____ day of January 2010.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Phillip Slape, Attorney for Claimant
Vince Burnett, Attorney for Respondent
Michael Bandre, Attorney for Midwest Insurance Co.
Christopher Cole, Attorney for Workers Compensation Fund
Nelsonna Potts Barnes, Administrative Law Judge

⁶ K.S.A. 44-534a.

⁷ K.S.A. 2008 Supp. 44-555c(k).